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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1976

STATE OF MINNESOTA, by its Attorney General, Warren Spannaus, and its Pollution Control Agency,
Appellant,

v.

MARTIN R. HOFFMAN, Secretary, Department of the Army; CORPS OF ENGINEERS, Department of the Army; LT. GEN. WILLIAM C. GRIBBLE, Chief of Engineers, Department of the Army; and COLONEL MAX NOAH, District Engineer, Corps of Engineers,
Appellees.

ON APPEAL FROM, AND PETITION FOR CERTIORARI TO, THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE STATES OF WISCONSIN AND MISSOURI AS AMICI CURIAE IN SUPPORT OF THE STATE OF MINNESOTA'S JURISDICTIONAL STATEMENT

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INTEREST OF THE AMICUS CURIAE

It is in the interest of the Amici Curiae, States of Wisconsin and Missouri, to seek a final determination of whether or not the Federal Water Pollution Control Act Amendments of 1972 (FWPCAA)[1/] make the United States

[1/] 86 Stat. 816, *et seq.*, 33 U.S.C. sec. 1251, *et seq.*, (Supp. IV, 1975).

Corps of Engineers subject to the substantive requirements imposed by these states' effluent limitations and water quality standards. The resolution of this question is critical to both Wisconsin and Missouri since the Corps dredges and dumps millions of tons of bottom sediments within the states' boundaries in the Mississippi River, the Missouri River, and Lake Superior each year.

The State of Wisconsin is also awaiting a decision, on cross motions for summary judgment, from the Federal District Court for the Western District of Wisconsin regarding these very issues. Consequently, duplicitious litigation will likely be avoided if this Court undertakes review of the Eighth Circuit's decision.

ARGUMENT

The FWPCAA Requires The Corps Of Engineers To Comply With The Substantive Requirements Of State Effluent Limitations And Water Quality Standards.

The Eighth Circuit Court of Appeals has issued a sweeping pronouncement that the Corps is exempt from the effluent limitations and water quality standards established by the states.[2/] The Eighth Circuit's decision has dealt a serious blow to the clear thrust and scheme of the FWPCAA. Section 101 of the Act, 33 U.S.C. sec. 1251 (Supp. IV, 1975), reads in pertinent part as follows:

> "(b) *It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution,* to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. . . ." (Emphasis supplied.)

Of greater significance is the language of Section 313 of the Act, 33 U.S.C. sec. 1323 (Supp. IV, 1975):

> "Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the *Federal Government* (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge

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[2/] 543 F. 2d 1198 (CA 8 1976).

or runoff of pollutants *shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution* to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. . . ." (Emphasis supplied.)

And, buttressing Section 313 is Section 510 of the Act, 33 U.S.C. sec. 1370 (Supp. IV, 1975) which reads:

"*Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants,* or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) *be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.*" (Emphasis supplied.)

Noteworthy is the fact that the states' water quality standards have been approved by the Administrator of the Environmental Protection Agency (EPA) pursuant to sec. 303 of the Act, 33 U.S.C. sec. 1313 (Supp. IV, 1975). Such is the case with Minnesota's water quality standards. What an anomaly should the Corps be exempt from the substantive requirements of these standards when they have been effectively mandated by the federal government pursuant to sec. 303.

We are not unmindful of this Court's recent decision in *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976), wherein it was held that federal installations are not subject to the permit requirements of Section 402(b), 33 U.S.C. sec. 1369(b) (Supp. IV, 1975). But in that case, the Environmental Protection Agency argued, and this Court agreed, that Section 313 of the Act makes it clear "that the amendments make clear 'only that facilities of the executive, legislative and judicial branches operating within the states must comply with the applicable effluent limitations and compliance schedules promulgated by the particular state pursuant to its EPA-approved implementation plan . . . .'" *EPA v. California ex rel. State Water Resources Control Board, supra,* at page 213. The Eighth Circuit has simply misinterpreted Section 313 of the Act in this regard and in so doing has grievously undermined one of the Act's specific intendments.

Moreover, the Eighth Circuit has failed to recognize that the Corps' own regulations provide for federal agency compliance with state substantive requirements. For example, 33 C.F.R. sec. 209.120(4)(ii)(1975), recognizes these requirements by stating:

". . . Federal agencies are required to comply with the substantive State, inter-

> state, and local water-quality standards and effluent limitations as are applicable by law that are adopted in accordance with or effective under the provision of the Federal Water Pollution Control Act . . . ."

Also, 33 C.F.R. sec. 209.145(b)(1)(1975), cites Section 313 as an applicable law in connection with the Corps' disposal of dredged material in navigable waters. It is certainly puzzling that the Eighth Circuit failed to discuss these references in its opinion when it specifically relied upon 33 C.F.R. sec. 209.145(b)(1)(1975) for the proposition that the Corps recognizes EPA supervision in connection with dredge spoil disposal sites.

CONCLUSION

The Corps of Engineers dredges rivers and lakes all over the United States involving millions upon millions of tons of spoil material that directly affects the integrity of this nation's waters. The issues as presented by the Eighth Circuit's decision are therefore deserving of review by this court.

Respectfully submitted,

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